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10/696,906	10/30/2003	Charles D. Powell	006394.00003	9238
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GABLE & GOTWALS 100 WEST FIFTH STREET, 10TH FLOOR TULSA, OK 74103			ROWAN, KURT C	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/696,906
Filing Date: October 30, 2003
Appellant(s): POWELL, CHARLES D.

MAILED

SEP 2 2 2005

GROUP 3600

Michael Sellers
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed July 11, 2005 appealing from the Office action mailed May 2, 2005.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

No evidence is relied upon by the examiner in the rejection of the claims under appeal.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-7 and 15-17 are rejected under 35 USC 103 as being obvious over Caccamo in view of Sugimoto.

Claims 1-7 and 15-17 are rejected under 35 USC 103 as being obvious over Sugimoto in view of Caccamo.

Claims 8-14 and 18-20 are rejected under 35 USC 103 as being obvious over Caccamo as modified by Sugimoto further in view of Porter.

Claims 8-14 and 18-20 are rejected under 35 USC 103 as being obvious over Sugimoto as modified by Caccamo further in view of Porter.

(10) Response to Argument

Applicant argues that the patent to Caccamo is a totally passive device that uses wind to animate the decoy attached to the end of flexible arm. Applicant argues that the patent to Sugimoto does not show or suggest a decoy or waterfowl luring apparatus of any kind and does not teach or suggest a waterfowl luring apparatus having one or more support arms for moving waterfowl along a substantially circular path. However, Caccamo shows a waterfowl decoy with a support arm that extends from a lower support to an upper end positioned above a rotatable platform. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicant argues that there is no motivation to make the proposed combination. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the motivation is generally available to one of ordinary skill in the art. One skilled in the art would know that it would have been obvious to use the concepts shown by Sugimoto to device a waterfowl decoy to attract other waterfowl by employing a waterfowl decoy to replace the bird repelling decoy of Sugimoto with a waterfowl decoy as shown by Caccamo. One skilled in the art would be capable of varying the control parameters of Sugimoto to make the decoy fly in a waterfowl attracting pattern. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As to the waterfowl decoy flying at a level below the point at which the suspension wire is attached for rotation. It should be

pointed out that Caccamo flies his decoy at a level above the mounting level. Further it is not seen that the level at the decoy flies at relative the mounting platform affects the function of the decoy apparatus at all. Hence, the level would be a matter of design choice noting that the advantage to having a high flying decoy would make it easier to see decoy from above would be readily apparent to those skilled in the art. As to combining Caccamo, Sugimoto with Porter, applicant again states that there is hindsight knowledge of the applicant's invention and there is nothing in Caccamo that limits the depth of the water that the device can be used in, which is true as long as a user can haul around an infinite length of pipe to sink into the bottom. But as a practical matter, the depth of the water has a limiting effect on how much pipe can be used and hence to move to a buoyant housing as shown by Porter has its benefits to one skilled in the art. So when Porter is taken as a whole, one skilled in the art would see the advantages of using a floating platform when in deeper water than the length of the pipe they had to use. Applicant's comments as to employing Sugimoto to scare birds from water have been noted.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Art Unit: 3643

Kurt Rowan

Kurt Rowan

Conferees:

PP PD

DA PA